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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 842

ROTARY DRILLING SERVICES, INC. and
F. M. BARTLETT,
Petitioners,

vs.

CHEROKEE LABORATORIES, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Rotary Drilling Services, Inc. and F. M. Bartlett, the petitioners herein, pray that a Writ of Certiorari be issued requiring the United States Court of Appeals for the Fifth Circuit to certify to this Court for its review the case of Cherokee Laboratories, Inc., Appellant, vs. Rotary Drilling Services, Inc., et al., Appellees, No. 22736, which is reported in ..... F. 2d ..... The opinion is appended hereto as Appendix "A".

GROUNDS FOR JURISDICTION

The opinion and judgment of the United States Court of Appeals was rendered July 25, 1967, petition for rehearing was denied September 13, 1967, and order for stay of mandate for filing petition for certiorari was entered September 26, 1967, for a period of 60 days.

The statutory provision believed to confer jurisdiction upon this Court to review the judgment in question is 28 U.S.C. 1254(1).

QUESTION PRESENTED FOR REVIEW

The question presented for review is:

Do Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2, require the manufacturer of a patented product, its exclusive distributor, or both, to sell the product to a customer who desires to resell it in competition with the distributor, when other and equivalent brands of the same product are not readily available in the market?

STATUTES

The case involves Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2:

"1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: * * *."

"2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with for-

eign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

STATEMENT OF THE CASE

Federal jurisdiction in the court of first instance (the United States Court for the Eastern District of Texas) was based upon 15 U.S.C. 22.

As was observed by the Court of Appeals, there is no real dispute as to the substantive facts. The case turns on the inferences to be drawn from those facts.

Respondent Cherokee Laboratories, Inc., plaintiff in the trial court and herein referred to as "Cherokee", was engaged in the business of selling additives to drilling mud used in the drilling of oil wells. It sold several products for this purpose.

Petitioner Rotary Drilling Services, Inc., herein referred to as "Rotary", a corporation wholly owned by Petitioner F. M. Bartlett, herein referred to as "Bartlett", was engaged in substantially the same business as Cherokee but sold its products through jobbers or manufacturers' representatives and did not maintain a sales force. (R. 123)

This case involves a patented product known as Lytron 886, hereinafter referred to as "Lytron", which is manufactured by Monsanto Company, also a defendant in the trial court, and which is herein referred to as "Monsanto". (R. 111)

On September 15, 1953, U. S. Patent No. 2,652,380 was granted to Monsanto covering the composition and

manufacture of Lytron. Monsanto attempted to market the product as a soil conditioner under the name "Krillium" but was unsuccessful. (R. 114) It also discovered that Lytron had potential as a drilling mud additive and made some sales for this purpose.

In 1956, Rotary began selling Lytron as a flocculating agent in oil well drilling, the purpose of its use being to flocculate or congeal the drilled solids and settle them out of the mud system. (R. 111-116) In about 1957, Pan American Petroleum Corporation, not a party to this action, at its research laboratories, in Tulsa, Oklahoma, began experimental work with Lytron and discovered that in addition to acting as a flocculating agent, this product would "beneficiate" or extend the yield of Bentonite, a clay commonly mixed with water to form the mud used in the drilling of oil wells by the use of rotary tools. (R. 121) That is, with the use of Lytron, less Bentonite would produce the required mud. (R. 766) On March 25, 1960, Pan American applied for a patent covering this unique combination of uses as to this and similar products, and on December 25, 1962, was granted Patent No. 3,070,543 relating to products having the combined ability to flocculate and beneficiate drilling muds in the oil drilling industry. (R. 121)

At about the same time as it filed its patent application, Pan American granted a non-exclusive license to Rotary to market the product. Rotary purchased the product from Monsanto in large quantities at 80 or 85 cents per pound depending upon whether it purchased in carload lots and placed the material in two pound bags which were in turn sold to Cherokee under the trade name "Ben-Ex" at $1.25 per pound. (R. 121-122, 759)

In February, 1961, Monsanto and Rotary entered into a written agreement by which Monsanto agreed to sell

Rotary its requirements of Lytron for a term of two years, and refer all inquiries from the oil industry to Rotary. The agreement, and the renewal thereof dated February 1, 1963, are set forth in full in the opinion of the Court of Appeals, Exhibit "A". (R. 117-118)

Cherokee makes no claim that there was any contractual agreement of any kind between Rotary and Cherokee which gave Cherokee any tenure as distributor of Lytron. (R. 82)

Cherokee sold the product to drilling mud companies at $2.00 per pound, most of it going to four companies which are dominant in the industry. (R. 765) They in turn sold it to the ultimate users (oil producers or drilling contractors) along with Bentonite and other products sold by them. This arrangement remained in effect until January, 1963. (R. 112, 764-765)

In January of 1963, Kenneth D. Fisher left the employ of Cherokee and became an employee of Rotary. At about the same time, four of Cherokee's salesmen left the employ of Cherokee and joined Rotary. (R. 112) Rotary advised Cherokee that it would henceforth sell the product direct to the drilling mud companies and advised Cherokee that if it desired to continue to purchase the product, its price would be $1.80 per pound. Rotary reduced the price to customers on sales of 10,000 to 20,000 pounds to $1.90 per pound and for 20,000 pounds or more to $1.80 per pound. (R. 112-113)

Cherokee was dissatisfied with the new price. (R. 1895) It attempted to purchase the product direct from Monsanto, but was unable to do so. (R. 802-815)

The last purchase of Lytron by Cherokee was at $1.80 per pound on April 29, 1963. Shortly thereafter, Cherokee ceased selling Lytron. (R. 1892-1896)

Cherokee had previously conducted tests on another product known as Gantrez which is manufactured by General Aniline and Film Corporation. Its testing had demonstrated to it that the product was equal to Lytron, and it then commenced marketing Gantrez for the same purpose as Lytron under the name "New and Improved Ben-Ex". (R. 1683-1684) Cherokee made 10 or 12 sales of Gantrez. Its executive in charge of sales testified that the product was "catching on" when the market suddenly "dried up" after Pan American Petroleum Corporation sent a letter to its field offices stating that Gantrez was inferior to Lytron. (R. 1685-1686)

Cherokee's complaint seeks treble damages measured by the profits it would have made had it continued as the sole distributor of Lytron to the oil industry, alleging that the actions of Rotary, Monsanto and Bartlett are in violation of Sections 1 and 2 of the Sherman Act.

ARGUMENT

The Court of Appeals has held that despite the fact that Monsanto is the holder of a patent covering the composition and manufacture of the product Lytron 886, it does not have the right to make Rotary its exclusive selling agent, and that Rotary, being the exclusive distributor, does not have the right to refuse to sell the product to Cherokee unless there are other and equivalent brands of the same product readily available in the market.

This holding is in direct conflict with the patent laws of the United States and the decisions of the Supreme Court of the United States.

The case of *Virtue* v. *Creamery Package Mfg. Co.*, 227 U.S. 8 (1912) long ago established the proposition that a

manufacturer, holding a patent on its product, may constitute another its exclusive sales agent *and that such exclusive agreement does not violate the Sherman Act (15 U.S.C. 1 and 2)*.

In so holding, recognizing that the patent laws authorize the creation of legal monopolies, the Court, speaking through Mr. Justice McKenna, said,

> "The Owatonna Company was a manufacturer of churns and butter workers under various patents owned by it, which articles it sold throughout the United States, and by the contract of April 19, 1897, it constituted the Creamery Package Manufacturing Company its sales agent of them, * * *. The contract was a perfectly legal one * * *. There were contracts between the Creamery Package Manufacturing Company and the Owatonna Company subsequent to the latter date, but all of them were supplemental to the first one and had no illegal taint. *It is true that they granted rights to the Creamery Package Company, and exclusive rights, but this was no violation of law. The owner of a patent has exclusive rights—rights of making, using and selling. He may keep them or transfer them to another—keep some of them and transfer others.*" (Emphasis supplied)

The rule remains unchanged and, until the present case, has been uniformly followed in the various circuits. See *Becton, Dickinson & Co. v. Eisele & Co.*, 86 F. 2d 267 (6th Cir. 1936), *Extracol Process, Ltd. v. Hiram Walker & Sons, Inc.*, 153 F. 2d 264 (7th Cir. 1946), *Brownell v. Ketcham Wire & Mfg. Co.*, 211 F. 2d 121 (9th Cir. 1954).

As was stated by the Court of Appeals in *Becton, Dickinson & Co. v. Eisele & Co., supra,* at page 268,

> "The Patentee is the sole judge of the licensee he shall select to make, to sell, or to use his patented article. Patentee's reasons for selection of its licensee

are of no concern to others. * * *. *This is settled law.*" (Emphasis supplied)

Having been selected by Monsanto to sell the patented article, does Rotary thereby "monopolize" under the Sherman Act?

Can it be that Monsanto may lawfully transfer a part of its patent monopoly to Rotary, yet Rotary may not lawfully receive it because of the anti-monopoly provisions of the Sherman Act?

The answer must of necessity be in the negative, because it is a part of the lawful monopoly of the patent which is conveyed.

Such was the precise holding of this court in *Virtue* v. *Creamery Package Mfg. Co., supra.* "It is true that they granted rights to (Rotary) and exclusive rights, but this was no violation of law."

Monsanto has a lawful patent monopoly, all or any part of which it could lawfully transfer to Rotary.

As was said in *Schwing Motor Co.* v. *Hudson Sales Co.* at 138 F. Supp. 899, opinion affirmed and adopted by the Court of Appeals for the 4th Circuit at 239 F. 2d 176, cert. den. 355 U.S. 823,

> "An exclusive agency or dealership necessarily involves a limited monopoly to sell the product of the manufacturer in the area covered by the exclusive agreement. Such limited monopolies are not invalid, Windsor Theatre Co. v. Wallbrook Amusement Co., supra; Brosious v. Pepsi-Cola Co., 3 Cir., 155 F. 2d 99, unless they are used to violate the antitrust laws. They may not be used to extend the producers' monopoly into other fields, e.g. the financing of General Motors automobiles, United States v. General Motors Corporation, 7 Cir., 121 F. 2d 376; Emich Motors Corp. v. General Motors Corp., 340 U.S. 558,

71 S. Ct. 408, 95 L. Ed. 534, modifying 7 Cir., 181 F. 2d 70. Nor may they be used to establish market dominance and drive out the products of competitors. United States v. Columbia Steel Co., 334 U.S. 495, 68 S. Ct. 1107, 92 L. Ed. 1533. *But the mere fact that such an agreement necessarily gives the dealer a monopoly* in handling the product of the particular manufacturer in a given area, and thereby enables the dealer to dictate the price at which the products of that manufacturer shall be sold in that area, subject to competition with the products of other manufacturers, *does not condemn such agreements; otherwise all exclusive agency agreements would be illegal per se.* Apex Hosiery Co. v. Leader, 310 U.S. 469, 60 S. Ct. 982, 84 L. Ed. 1311; Windsor Theatre Co. v. Wallbrook Amusement Co., 4 Cir., 189 F. 2d 797; Arthur v. Kraft-Phenix Cheese Corp., D. C. Md., 26 F. Supp. 824." (Emphasis supplied)

The possession of a lawful monopoly, which of necessity gives Rotary the power to determine the method by which the product will be marketed and the price at which it will sell it, must also give it the right to refuse to deal under the standards established by *U. S.* v. *Colgate and Co.*, 250 U.S. 300, and the decisions under it.

As was said by the Court of Appeals for the 6th Circuit in *Ace Beer Distributors, Inc.* v. *Kohn, Inc.*, 318 F. 2d 283 (1963),

> "In essence, the complaint alleges that the defendants conspired to destroy plaintiff's business and to eliminate it as a beer distributor in interstate commerce and that this was accomplished by the termination by Stroh of plaintiff's franchise as its beer distributor and thereafter conducting its business through another distributor. * * *."
>
> "That, without the results proscribed by the Sherman Act, is not a violation of the Act. A manufacturer has a right to select its customers and to refuse to

> sell its goods to anyone, for reasons sufficient unto itself. United States v. Colgate & Co., 250 U.S. 300, 39 S. Ct. 465, 63 L. Ed. 992. A refusal to deal becomes illegal under the act only when it produces an unreasonable restraint of trade, such as price fixing, elimination of competition or the creation of a monopoly. (Citations omitted) The fact that a refusal to deal with a particular buyer without more, may have an adverse effect upon the buyer's business does not make the refusal to deal a violation of the Sherman Act. Damage alone does not constitute liability under the act."

None of these abuses is claimed to have been committed by Rotary.

The fallacy, we think, in the rule as applied by the Court of Appeals is in its assumption that a monopoly is created by Rotary's refusal to deal with Cherokee, when in fact the monopoly is created, not by Rotary, or anything it has done, but by the patent.

The same is true of its holding that there is an issue of fact as to whether there may have been a conspiracy between Rotary and Fisher to induce some of Cherokee's salesmen to join Rotary in furtherance of the creation of a monopoly in Rotary.

The employment of those men, unless for the purposes of creating a monopoly or other restraint of trade forbidden by the Sherman Act, is not unlawful. *Harley & Lund Corp.* v. *Murray Rubber Co.*, 31 F. 2d 932.

Again, the monopoly complained of was created by the patent, and whether or not Rotary induced Cherokee's employees to leave Cherokee and join Rotary, or conspired with others to do so, cannot have added to nor detracted in any measure from the complete monopoly it already lawfully possessed.

Rotary is not accused of abusing the patent monopoly—only of exercising it by deciding to stop marketing Lytron through Cherokee as an exclusive jobber and to perform that function itself.

It did not attempt to extend the patent monopoly to other products, or into other areas of commerce. It did not make tieing agreements, attempt to control resale prices, or indulge in any of the numerous activities which have been condemned as abuses under the antitrust laws. It did only what the lawful and natural monopoly of the product gave it the power to do—select its customers.

The issue of whether there are competitive products is, we submit, wholly unrelated to the patent question. Ordinarily it would be expected that the existence of the patent would preclude the possibility of the availability of other brands of the same product.

It is the uniqueness of the product which makes it patentable, and it is totally anomalous to hold that the existence or absence of competitive products determines the validity of the patent monopoly when related to the Sherman Act.

The error of the Court of Appeals becomes readily apparent when we draft a syllabus to reflect the rule of law thereby established:

> Neither the holder of a patent, nor its licensee, has the exclusive right to sell the patented product unless there are other and equivalent brands of the same product readily available in the market.

WHEREFORE, these petitioners respectfully submit that a writ of certiorari should issue, that this Court may review the decision of the Court of Appeals for the Fifth

Circuit, and that upon the review thereof that Court be directed to affirm the decision of the trial court.

Respectfully submitted,

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APPENDIX "A"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 22736

CHEROKEE LABORATORIES, INC.,
Appellant,

versus

ROTARY DRILLING SERVICES, INC., ET AL.,
Appellees.

Appeal from the United States District Court for the Eastern District of Texas.

(July 25, 1967.)

Before RIVES, WISDOM and AINSWORTH, Circuit Judges.

RIVES, Circuit Judge: The plaintiff[1] seeks damages arising out of alleged violations by defendants[2] of Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C.A. §§ 1 and

1. Cherokee Laboratories, Inc., hereafter referred to as "Cherokee."

2. Monsanto Company, Rotary Drilling Services, Inc., Kenneth D. Fisher and F. M. Bartlett, hereafter referred to as "Monsanto," "Rotary," "Fisher," and "Bartlett," respectively.

2, and the Texas antitrust laws, Arts. 7426-7447, Texas Revised Civil Statutes. The district court quashed the service of summons on the defendant Bartlett. At the conclusion of the plaintiff's evidence, the district court directed a verdict for the remaining defendants. From the ensuing judgment this appeal is prosecuted.

The complaint relates to a highly specialized commodity in a very limited market. Cherokee's principal business is that of marketing additives to mud systems in drilling oil and gas wells. The product Lytron 886, hereafter Lytron, is a chemical polymeric compound originally developed by Monsanto research chemists for its effects on the fertility and cultivation of the soil. On September 15, 1953, U.S. Patent No. 2,652,380, was granted to Monsanto covering the composition and manufacture of Lytron. Its attempts to market the product for soil treatment met with failure, but it soon discovered that Lytron had potential as a drilling mud additive.

Rotary is an Oklahoma corporation, whose sole stockholder, prior to January 1963 was Bartlett. In 1956, Rotary began selling Lytron as a flocculating agent, that is an agent which "flocs" or congeals drilled solids and bit cuttings and settles them out of the mud system. About 1957 Pan American Petroleum Corporation, with research laboratories in Tulsa, Oklahoma, began experimental work with Lytron through which it later discovered that Lytron, in addition to acting as a flocculating agent, would "beneficiate," that is extend the yield of bentonite, a clay used as a mud builder in drilling mud systems. On March 25, 1960, Pan American applied for a patent covering this unique combination of uses of this and similar products, and on December 25, 1962 was granted Patent Number 3,070,543. This suit relates to the market of products having the combined ability to flocculate and beneficiate drill-

ing muds in the oil field drilling industry in the United States. We accept Cherokee's description of the relevant market:

> "The Pan American patent actually defines the scope of the product market (i.e., products have combined beneficiating and selective flocculating abilities when used in a drilling mud system).
>
> "Geographically, the market for the product is the United States. The size of the market is not measured by area, but by the number of wells in which low solids drilling fluids can be used (R. 1259). The market for Ben-Ex (Cherokee's tradename) is a fairly small percentage of the total wells drilled in the United States each year, but there are approximately 55,000 to 60,000 wells drilled in a year, and an appreciable number of these are wells in which this material could be used (R. 1327). According to Dr. Paul Hawley, of Pan American Petroleum Corporation, there are at least 5,000 wells per year drilled in which Ben-Ex could be used, and Pan American Petroleum Corporation drills about 500 of these (R. 1259). At the end of 1963, only approximately 1,000 of these wells, or 20 percent of the potential market, was being serviced (R. 1327).
>
> "The market for Lytron 886 increased from 100 wells drilled in 1961, to a thousand wells per year by the end of 1963 (R. 1327). The principal customers for the product are Magnet Cove Barium Corporation, Houston, Texas; Baroid Division, National Lead Company, Houston, Texas; International Minerals and Chemicals Corporation, Houston, Texas; Milwhite Mud Sales Company, Houston, Texas, and numerous small mud companies (R. 1190)."

At about the same time as it filed its application for the patent, Pan American granted a nonexclusive license

to Rotary to market the product. From early 1960 until January of 1963, Rotary did not have a sales organization; it made no sales of Lytron directly to drillers or mud service companies, but sold only to Cherokee for resale to the oil and gas industry. Cherokee, being the only concern selling the product during this period, developed the market and it became one of the most important products sold by Cherokee.

In February, 1961, Monsanto and Rotary entered into the following written agreement:

"Rotary Drilling Services, Inc.
Post Office Box 7265
Tulsa, Oklahoma

Attention: Mr. F. M. Bartlett

Gentlemen:

Summarizing our previous correspondence and the discussions which you have had with Mr. Wilkinson, Monsanto proposes to reply (sic) on you to promote the use of our polyelectrolyte resin Lytron 886 as an additive to oil well drilling muds on the following basis:

1. Monsanto will sell you your full requirements of Lytron 886 for a period of two years beginning March 1, 1961. The price and terms of sale of this product will be those currently in effect and as they may be changed from time to time. Current prices and terms of sale are set forth in the attached price schedule. Please note that, as set forth in the Conditions of Sale appearing on the reverse of the present price schedule, Monsanto cannot be liable for any claims arising from use of our products in a buyer's manufacturing processes or in combination with other substances.

2. Monsanto will refer to you all inquiries which it may receive during this two-year period

relative to use of Lytron 886 in oil well drilling mud applications. You are aware, however, that we have other customers for this material and that legally we would have no right to attempt to restrict the end use made by others as to products sold them.

3. You agree to make all reasonable efforts to promote the use of Lytron 886 in oil well drilling muds through sales activities, advertising and other marketing efforts to be conducted by you and at your own expense. Monsanto will, however, stand ready to provide you such technical assistance as in our judgment would be helpful to support this promotional effort.

4. Prior to the expiration of the two-year period of this agreement, the parties will review the progress which has been made and the prospects, as they then appear, for future growth in your proposed use of Lytron 886 and will discuss an appropriate basis for a continued relationship.

"If the foregoing is agreeable with you and you wish to go forward in accordance with it, please so indicate by signing and returning to us the attached copy of this letter.

Very truly yours,

s/c C. L. Jones
C. L. Jones
Director of Sales
Resin and Coating Products

mpd
Enclosures (2)

Date: .....

Agreed to:

ROTARY DRILLING SERVICES, INC.

By s/ Floyd M. Bartlett
F. M. BARTLETT

Its President"

From 1955 until January 1963, Fisher was with Cherokee, first as sales engineer, then sales manager, then vice president and finally as president. In January 1963, Fisher and four of Cherokee's salesmen left Cherokee and joined Rotary which began selling directly to the mud companies.

Rotary was purchasing Lytron from Monsanto at 0.80 or 0.85 per pound, depending on whether it was purchased in carload or partial lots. Up to January 1963, Rotary was selling Lytron to Cherokee at $1.25 per pound and Cherokee was reselling it to mud companies at $2.00 per pound and to drilling companies at $2.85 per pound. Monsanto did not raise its price to Rotary. However, after Rotary took over sole distribution of Lytron, it raised the price to Cherokee from $1.25 to $1.80 per pound. Rotary also absorbed freight to the nearest warehousing point to the customer, and reduced its price to customers on sales from 10,000 to 20,000 pounds from $2.00 to $1.90 per pound, and at 20,000 pounds or over to $1.80 per pound.

On February 1, 1963, the sales agreement between Monsanto and Rotary heretofore quoted, *supra* pp. A4-A5, was renewed by letter agreement as follows:

"Rotary Drilling Services, Inc.
Post Office Box 7265
Tulsa, Oklahoma

Attention: Mr. F. M. Bartlett

Gentlemen:

Monsanto Chemical Company is agreeable to the renewal of our agreement dated February 13, 1961, for a period of two years beginning March 1, 1963. A copy of the terms of this agreement is attached.

If the foregoing is agreeable with you, and you wish to go forward in accordance with it, please so indicate by signing and returning to us the attached copy of this letter.

Very truly yours,

s/ T. B. Wilkinson
T. B. Wilkinson
Product Sales Manager
Industrial Resins

TBW: lhs

Date: Feb. 1, 1963

Rotary Drilling Services, Inc.

By s/ F. M. Bartlett
F. M. Bartlett
Its President"

Cherokee attempted to purchase Lytron from Monsanto but was informed "that they had some sort of arrangement with Rotary Drilling Services whereby all of the oil field sales had to go through Rotary." The last purchase of Lytron by Cherokee was from Rotary of 2000 pounds at the increased price of $1.80 per pound on April 29, 1963. Cherokee then ceased to sell Lytron, leaving Rotary as the only seller of that product to the oil and gas industry in the United States.

There was only one other product known to anyone other than Pan American which might possibly perform the same functions as Lytron, i.e., beneficiate or extend the yield of bentonite clay and flocculate or drop out drill solids. This product was manufactured by the General Aniline and Film Corporation. For the required function, it was mixed with soda ash. When so mixed the product was called "Gantrez." The research and development de-

partment of Cherokee discovered this use of Gantrez in late 1961 or early 1962. A use patent was denied because such use was already covered by the Pan American patent. In the spring of 1962, Cherokee attempted to get the product licensed by Pan American, but without success. Pan American's tests proved to its satisfaction that Gantrez was not a satisfactory product for this use. Lytron is the only product ever approved by Pan American under its patent. As to Pan American's laboratory tests of Gantrez, Dr. Paul Hawley testified:

> "Several such tests have been made. One was made when the material was originally submitted to us early in 1962, probably in the month of February. The other tests were made in late 1963 and early in 1964. In all of the tests, approximately the same results were obtained on the properties which we looked for in a material which is supposed to be a good bentonite beneficiater and a drilling solids flocculent. The material tested was not outstanding. It was better than some other materials we had tested and not as good as several others, including Lytron 886."

Commencing in October or November 1963, Cherokee attempted to market Gantrez which it represented as its new and improved Ben-Ex. Effective April 8, 1964, Cherokee secured a license agreement from Pan American subject to several provisos, including the following:

> "Licensee agrees that in its sales and promotion efforts it will not represent that Pan American endorses in any way the use of a mixture of Gantrez resin and soda ash, or its equivalent, as a drilling mud additive."

Cherokee made ten or twelve sales of Gantrez amounting to approximately 4000 pounds. The market then suddenly "dried up" after Pan American sent a letter to

its field offices stating that Cherokee's product was inferior to Lytron.

I.

The district court erred in quashing the summons served upon the defendant Bartlett. That service was under Article 2031b, Texas Civil Statutes, which provides for service on a nonresident who "engages in business" in Texas by serving the Secretary of State, as agent, in any suit "arising out of such business done in the State." Section 4 of the Article provides:

> "Any * * * nonresident natural person shall be deemed doing business in this State by entering into contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this State, or the committing of any tort in whole or in part in this State."

The complaint contained a number of allegations which would charge Bartlett with doing business in Texas. Among others, it charged that he committed a tort which included a conspiracy with Fisher then a resident of Texas, to be performed in part in Texas, the purpose and eventual result of which was to induce Cherokee's sales force to leave Cherokee and join Rotary. Service of process on Bartlett was valid.

II.

We review the district court's direction of a verdict for the defendants in the light of the Supreme Court's statement that "the right to trial by jury applies to treble damage suits under the antitrust laws, and is, in fact, an essential part of the congressional plan for making competition rather than monopoly the rule of trade, see *Fleit-*

mann v. *Welsbach Street Lighting Co.*, 240 U.S. 27, 29." *Beacon Theatres* v. *Westover*, 1959, 359 U.S. 500, 504.

So far as the testimony has developed, there is no real dispute about the substantive facts. The case turns on the inferences to be drawn from those facts. In a recent opinion by Chief Judge Tuttle,[3] this Circuit has held that *Lavender* v. *Kurn*, 1946, 327 U.S. 645, has general application in determining whether the evidence is sufficient to raise a question for the jury:

> "If proven facts do give support to the inference necessary to sustain a plaintiff's case, then, under the rule of *Lavender*, it is immaterial that they give equal support to a contrary inference. It is only when there is a *complete absence* of probative facts to support the conclusion reached that the jury's judgment may be ignored."

The district court stated its reasons for directing a verdict as follows:

> " * * * I have been unable to find any case by any Court of Appeals or by the Supreme Court that has in anywise held contrary to or overruled the holding of the Court of Appeals of the Fifth Circuit in *Kinnear-Weed versus Humble Oil and Refining Company* [214 F.2d 891, 894] to the effect that public injury is a necessary condition precedent to a cause of action such as that asserted by the Plaintiff in this case under the Federal antitrust laws.
>
> "Now, in each case that the Plaintiff has cited to the Court there has been a holding that that particular alleged violation, or violations there, was a violation per se. The evidence in this case

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3. Planters Manufacturing Company v. Protection Mutual Ins. Co., 5 Cir., No. 23019, decided May 26, 1967, ms.

wholly fails to establish, in my opinion, a per se violation of the antitrust laws.

"And, while I think there are some merits maybe to some of the other grounds asserted by the moving Defendants in their Motion for Instructed Verdict, insofar as the Federal antitrust laws are concerned, I need not go any further than this determination that the Plaintiff has wholly failed to establish in this case any public injury.

"Furthermore, I find and conclude that the Plaintiff has wholly failed to establish a case under the Texas antitrust laws.

"Therefore, the Motion for Instructed Verdict of each of the Defendants will be granted."

III.

In *Rogers* v. *Douglas Tobacco Board of Trade, Inc.*, 5 Cir. 1959, 266 F.2d 636, 644, we again gave consideration to the question of showing public injury in private Sherman Act cases and said:

"In the Sherman Act Congress has determined that certain prohibited activities are injurious to the public. * * * As to classes of restraints which from their 'nature or character' are unduly restrictive, Congress has determined its own criteria of public harm. Klor's, Inc. v. Broadway-Hale Stores, Inc., 79 S.Ct. 705, 709. In restraints, like the present one to which 'the rule of reason' applies, while the jury should not, and cannot properly, reject the policy of the Sherman Act which has been determined by Congress, it must still decide whether the particular conduct is reasonably calculated to prejudice the public interest which that Act is designed to protect. * * * That does not mean that specific public injury

> must be proved before a private person can recover; but before it can be said that the conduct is forbidden as *unreasonably* restraining trade or commerce within the meaning of the Sherman Anti-Trust Act it must appear that it *tends* or is *reasonably calculated* to prejudice the public interest."

We adhere to those views. They are sustained in a full discussion in a recent text, Timberlake, Federal Treble Damage Antitrust Actions, ch. 15, §§ 15.01-15.07, pp. 191-206.

> "When the factual situation does not present a per se violation, before a violation may be found, it must be determined that the activity unreasonably restrains trade. If it is not unreasonable it is not a violation. The only way in which to determine whether an activity is unreasonable is to apply the test of injury to the public as part of the broader test of the rule of reason."[4]

If the evidence presented no more than the substitution of Rotary for Cherokee as the exclusive distributor of Lytron, there would be no public injury because there would be no more restraint of trade than existed at the time of the substitution. That is, however, too narrow a view. Cherokee complains that it was prevented from marketing Lytron in competition with Rotary. It was open to the jury so to find, and further to find that such a restraint is reasonably calculated to prejudice the public interest. Rotary bought Lytron from Monsanto at 80 cents per pound and resold it to the mud companies at $2.00 per pound. A jury could reasonably infer that if

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4. Timberlake's full discussion demonstrates, we think, that this view is consistent with recent Supreme Court decisions dealing with allegations and proof of "public injury" in private actions under the antitrust laws.

Rotary had competition the markup in price would be somewhat less than 150 percent. Further, Rotary was servicing only about 1000 wells per year out of a potential of at least 5000 wells per year. With two distributors competing, some of the remaining 80 percent of the potential market might have been serviced with resultant savings in drilling costs.

It was clearly open to the jury to infer from the original letter agreement, dated February 13, 1961, between Rotary and Monsanto and the correspondence leading up to that agreement that Rotary was to be the exclusive distributor of Lytron to the oil industry and that Rotary agreed to limit its sales to that industry. We agree that Cherokee proved no injury from that limitation, for Cherokee was interested only in sales to the oil industry. We agree also that, even though Rotary was to be the exclusive distributor, the initial distributorship agreement between Monsanto and Rotary may have been entirely reasonable and legal. Monsanto's attempts to market Lytron had been unsuccessful. At that time no one other than Rotary and its sole stockholder, Bartlett, expressed an interest in undertaking to develop and distribute Lytron in the oil and gas market. The market was in its infancy. Monsanto sought to establish a market for Lytron by placing it in the hands of a single distributor who would actively promote and stimulate sales for the product. We need not review the many authorities cited by the parties on the validity of exclusive dealership agreements, for the law has been fairly summarized by the Supreme Court in the very recent case of *United States* v. *Arnold, Schwinn & Co., et al.*, No. 25, Oct. Term 1966, decided June 12, 1967:

> "At the other extreme, a manufacturer of a product, *other and equivalent brands of which are*

> *readily available in the market,* may select his customers, and for this purpose he may 'franchise' certain dealers to whom, alone, he will sell his goods. Cf. *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919). If the restraint stops at that point—if nothing more is involved than vertical 'confinement' of the manufacturer's own sales of the merchandise to selected dealers, *and if competitive products are readily available to others,* the restriction, on these facts alone, would not violate the Sherman Act." (Emphasis added.) (Slip opinion p. 10.)

In the present case it was open to the jury to infer that competitive products were *not* "readily available" to others. Even so, we need not decide whether a jury could properly determine that the initial distributorship agreement constituted an unreasonable restraint of trade. The critical time in this case is when their sales agreement was renewed in February 1963.

The situation had radically changed in the two years since the original agreement. While the market was not completely developed, it was no longer in its infancy. Roughly 1000 of the potential 5000 annual drillings of wells were being serviced as compared with service to only 100 wells drilled in 1961. Monsanto's sales of Lytron to Rotary had been multiplied many times:

"Year	Pounds	Price
* * * *		
1960	11,000	9,350.00
1961	36,500	31,025.00
1962	112,340	93,337.00
1963	172,750	138,200.00"

Of more immediate concern, the jury could have found that Rotary had excluded Cherokee from the mar-

ket and that Monsanto had some knowledge or notice of the dealings between Rotary and Cherokee.

Indeed, in the state of the record when the verdict was directed at the conclusion of the plaintiff's evidence, we think that the jury could have inferred the existence of facts constituting a per se violation of Section 1 on the part of Rotary and Monsanto. The jury could have found that Monsanto refused to deal with Cherokee because of its agreement with Rotary, and that Rotary priced Cherokee out of the market which it was able to do only because of the protection of its agreement with Monsanto. Such conduct would constitute a per se violation of Section 1.[5] See *White Motor Co.* v. *United States*, 1963, 372 U.S. 253; *Klor's, Inc.* v. *Broadway-Hale Stores*, Inc., 1959, 359 U.S. 207; *Northern Pacific Railway Co.* v. *United States*, 1958, 356 U.S. 1; *Lorain Journal* v. *United States*, 1951, 342 U.S. 143, 154, 155; *Washington State Bowling Prop. Assn.* v. *Pacific Lanes, Inc.*, 9 Cir. 1966, 356 F.2d 371.

We have thought it necessary to discuss at any length only the agreements between the two corporations, Cherokee and Rotary, for the evidence clearly developed a case for the jury's determination as to whether Fisher agreed with Rotary and its sole stockholder Bartlett that Fisher and four salesmen would leave Cherokee and join Rotary to promote Rotary's sale of Lytron and to exclude Cherokee from the market.

We hold that lack of proof of public injury, the reason relied on by the district court, did not justify its direction of a verdict for the defendants. It is suggested

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5. Unless Gantrez was truly a competitive product with Lytron, which, as hereinafter discussed, also presents a question of fact for the jury.

that two other grounds existed for a direction of the verdict, viz.: a failure of proof as to damages and Monsanto's rights under its patent.

Cherokee's projection of its lost profits was based upon the assumption that Cherokee remained the sole seller of Lytron and that its and Rotary's roles were reversed. Since Cherokee was excluded from the market, those were the only available figures from which the jury could infer what Cherokee's loss as a competitor would have been. Such deduction or inference was, of course, necessary.[6] If the defendants are guilty of excluding Cherokee from the market as a competitor, they cannot complain of the lack of evidence for which they are responsible. Once the fact of injury is established, the jury has considerable leeway in assessing the amount of damages. *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 9 Cir. 1960, 284 F.2d 1, 32, *rev'd on other grounds*, 1962, 370 U.S. 19.

Monsanto insists that there was no substantial evidence to show the *fact* as distinguished from the *amount* of damages, because Cherokee's failure in marketing the competitive product Gantrez was due solely to Pan American's disparagement of that product combined with Cherokee's own business ineptitude. The jury could have determined that Pan American was justified in discouraging the use of Gantrez under its patent and that such action was reasonably to be anticipated. Whether Cherokee suffered losses attributable to antitrust violations or to other economic factors were matters for the jury's consideration and determination.

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6. We do not mean to imply that the jury must necessarily have found a lesser amount as Cherokee's damages. Eighty percent of the market was undeveloped and competition in the field would not necessarily have resulted in price reduction or in decrease of the volume of sales.

As to Monsanto's patent, we need go no further than the "starting point":

> "Our starting point is the general rule that the first authorized sale of a patented article 'exhausts' the patent monopoly.[64]

Report of the Attorney General's National Committee to Study the Antitrust Laws (1955), at 240. Monsanto's patent did not permit it to vest Rotary with the arbitrary power to price Cherokee out of the market. Nor could Monsanto's contract with Rotary operate to combine its patent monopoly with that of Pan American and thus to vest in Rotary power to price a competitor out of the market. See *United States* v. *New Wrinkle, Inc.*, 1952, 342 U.S. 371, 378, 379.

IV.

We think also that the evidence presented a case for the jury's determination as to whether the defendants monopolized or attempted to monopolize the market in violation of Section 2 of the Sherman Act. Rotary remains the sole distributor of any product having the combined ability to flocculate and beneficiate in the drilling of oil wells in the United States. Pan American has approved no product other than Lytron for use under its patent. It was for the jury to say whether the realities of the market situation eliminate Gantrez as an effective substitute for Lytron. No other substitute exists, except

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[64] *Hobbie* v. *Jennison*, 149 U.S. 355 (1893); *Adams* v. *Burke*, 17 Wall. 453 (U.S. 1873); *United States* v. *Univis Lens Co.*, 316 U.S. 241 (1942); Cf. *Mitchell* v. *Hawley*, 16 Wall. 544 (U.S. 1873)."

perhaps some within the exclusive knowledge of Pan American and which it refuses to reveal. In this limited and narrow field it was open to the jury to find that the defendants monopolized or attempted to monopolize the market. Compare *United States* v. *E. I. duPont de Nemours & Co.*, 1956, 351 U.S. 377.

V.

The district court did not err in directing a verdict for the defendants as to any violation of the Texas antitrust laws. There was no evidence that Monsanto or Rotary imposed any restriction on intrastate commerce. The dealings between Monsanto and Rotary were in interstate commerce, and Monsanto's refusal to deal with Cherokee was in interstate commerce. Any restraint on the marketing of the product was imposed in interstate commerce and not after the product had been put into intrastate commerce. The legality vel non of the dealings should be tested by the federal antitrust laws and not by those of the State of Texas. *Sloan* v. *Miami Margarine Co.*, Tex.Civ.App. 1952, 247 S.W.2d 169, 171, 172; *Denison Mattress Factory* v. *Spring-Air Co.*, 5 Cir. 1962, 308 F.2d 403, 413.

The judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.